identify any state arbitration award approving intercarrier compensation terms identical or substantially similar to the compensation terms Consolidated proposes here.[109]

Sprint claimed that the fact Consolidated offered VoIP compensation terms to ETS that are identical to those Sprint proposes, but that Consolidated is opposed to interconnecting with Sprint under the same terms is plain proof that Consolidated is in violation of its duty not to discriminate against carriers in providing terms of interconnection.[110] Sprint also claimed Consolidated's excuse that ETS VoIP traffic was expected to be "incidental" is neither credible nor relevant. According to Sprint, nothing in the ETS agreement defines when VoIP traffic has grown to the point where it is no longer "incidental" and thus where Section 10.2 VoIP compensation terms no longer apply. Furthermore, Sprint noted, nothing in the ETS agreement limit the quantity or percentage of traffic that is expected to be VoIP.[111] Sprint claimed the intercarrier compensation scheme for VoIP traffic proposed by Consolidated in this arbitration is ambiguous. Sprint suggested that rather than struggle with how Consolidated's proposed terms would work in practice, the Commission should reject the proposed terms in their entirety.[112] Sprint recommended the Commission accept Sprint's proposed contract language for Section 10.2.[113]

Sprint argued that VoIP traffic should not be subject to more onerous terms than TDM traffic and noted there are several million VoIP subscribers in the United States that interconnect in one form or another with the PSTN. Further, Sprint noted that when it exchanges its traffic with Consolidated the traffic will be in TDM format and will look just like other telecommunications traffic.[114] Sprint claimed there is no cost-related basis for Consolidated's proposed asymmetrical compensation scheme and asserted that Consolidated admitted that it has

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[109] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33.

[110] Sprint Post-hearing Brief at 11; *see also Qwest Corp v. PSC of Utah*, 2005 U.S. Dist. LEXIS 38306 (D. Utah 2005) (discussing Section 252 statutory language and Congressional policy to permit interconnection or just, reasonable, and nondiscriminatory terms; public filing "gives the CLECs that are not parties to the agreement the opportunity to resist discrimination my allowing them to fully evaluate and request the same terms given to the contracting CLEC.")

[111] Sprint Post-hearing Brief at 11.

[112] Sprint Post-hearing Brief at 12.

[113] Sprint Post-hearing Brief at 13.

[114] Sprint Post-hearing Brief at 14.

not included in the record any cost study to support its one-way $0.004931 proposed termination charge.[115] According to Sprint, there is no record evidence to support Consolidated's proposed terms of compensation.[116]

Consolidated's Position

Consolidated argued VoIP should be treated separately for compensation and other purposes in the Agreement. First, Consolidated contended the Commission has no jurisdiction to address VoIP issues in this docket because the FCC has preempted state action in regard to VoIP. Second, Consolidated stated that assuming the Commission intends to proceed with this arbitration, notwithstanding the FCC's order preempting action on VoIP, it is important that the agreement separately address VoIP issues given the regulatory uncertainty and unique nature of that service.[117]

Consolidated argued that Sprint wants to improperly treat VoIP traffic as telecommunications service and to "shoehorn" its wholesale provider VoIP-based business model into what looks like a retail PSTN-to-PSTN interconnection agreement.[118] Consolidated argued Sprint's approach ignores the fact that the issue of whether or not VoIP is even a Telecommunications Service under Title II of the FTA has yet to be decided by the FCC.[119] Consolidated argued that it does not believe that a requesting carrier, such as Sprint, may force an ILEC to interconnect under section 251 of the FTA primarily for non-telecommunications services.[120] Consolidated argued that the FCC has not determined VoIP-originated traffic to be a Telecommunications Service and has taken exclusive jurisdiction over VoIP. Yet, according to Consolidated, the Commission has decided to address this issue in this arbitration.[121] Consolidated proposed that VoIP be addressed as a separate attachment, with the objective of isolating VoIP and VoIP-related issues to avoid the situation the Commission experienced in the

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[115] Sprint Post-hearing Brief at 14.

[116] Sprint Post-hearing Brief at 14.

[117] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 11-12.

[118] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[119] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[120] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[121] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

UTEX/SBC arbitration. Consolidated claimed that in Docket No. 26381, *Petition by UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act, and PURA for Rates, Terms, and Conditions of Interconnection Agreement for Southwestern Bell Telephone, L.P. d/b/a SBC Texas,* the Commission had no choice but to ultimately abate the entire proceeding, noting as a reason for abatement that the FCC intended to address the VoIP issues raised in that proceeding.[122] According to Consolidated, in the event the VoIP provisions of the interconnection agreement have to be undone, it would be easier to do so if those provisions are in a stand-alone attachment as Consolidated has proposed.[123]

Consolidated argued that there is no "standard" interconnection agreement that addresses the compensation mechanism for VoIP traffic and there is no "standard" interconnection agreement that sets forth the protection for both parties, given the inherently nomadic nature of VoIP traffic.[124] Consolidated claimed its interconnection agreement with ETS contemplates the exchange of VoIP-originated traffic on an incidental basis. Consolidated believes Sprint's reliance on Section 10.2 General Terms and Conditions of the Consolidated/ETS agreement as a basis for Sprint's contention that Consolidated has already agreed to exchange VoIP traffic is misplaced. Consolidated argued that Section 10.1 of the Consolidated/ETS agreement expressly provides that nothing in that agreement shall be construed to determine the appropriate treatment of VoIP traffic. Consolidated highlighted contract language in the Consolidated/ETS agreement that states "...nothing in this Agreement or in any Attachments hereto constitutes agreement or shall be construed to affect or determine the appropriate treatment, for compensation and other purposes, of Voice Over Internet Protocol or other Internet protocol-enabled ("VOIP") traffic under this Agreement or any further Interconnection Agreements."[125] Consolidated argued that Sprint should not selectively rely solely on Section 10.2 which, provides a compensation mechanism in the event there is incidental VoIP traffic.[126]

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[122] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[123] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[124] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 13-14.

[125] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 14.

[126] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 15.

Consolidated avers that Section 10.2 is important because it clarifies that notwithstanding any compensation mechanisms in the agreement for non-VoIP traffic, the Parties acknowledge that VoIP will be compensated under the provisions of Attachment 10.[127] Section 10.4 requires Sprint's last-mile provider customers to offer VoIP service from fixed locations. According to Consolidated, Section 10.4 is important because the last-mile provider, not Sprint, has control of the originating network.[128]

Consolidated called specific attention to Attachment 2, Section 3, Footnote 6 of its proposed Interconnection Agreement. According to Consolidated, Attachment 2 addresses compensation for traffic to be exchanged by the parties and Section 3 of that attachment covers compensation for local traffic, EAS traffic, and local ISP-bound traffic. Consolidated's footnote 6 to Section 3 states that reciprocal compensation and/or bill and keep are not appropriate for VoIP traffic unless and until the FCC orders otherwise. Consolidated argued that in the event the language of Attachment 10 is not adopted and Consolidated is not compensated for IP-PSTN terminating traffic under Attachment 10, this footnote sets forth the compensation for VoIP traffic.[129]

Consolidated explained that the compensation mechanism in footnote 6 to Section 3 would require Sprint to pay Consolidated $0.004931 per minute of use for terminating VoIP on Consolidated's network. Furthermore, Consolidated stated that it should not compensate Sprint for PSTN-to-IP traffic (*i.e.*, traffic from Consolidated to Sprint) as, according to Consolidated, the last-mile provider is already compensating Sprint for both originating and terminating such traffic. Consolidated argued that reciprocal compensation should not apply because, under FCC rule 51.701(e), reciprocal compensation applies only if the parties are exchanging traffic originating over their own networks. Consolidated argues that the traffic at issue here does not originate on Sprint's network, it originates on the network of the last-mile provider. [130]

Consolidated's proposed compensation mechanism for wholesale VoIP traffic is that Sprint will pay Consolidated the greater of either $0.004931 per minute of use or *x*-percent of

[127] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 16.

[128] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 16.

[129] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 16-17.

Sprint's terminating services charge to the applicable last-mile provider. Consolidated noted that the alternative *x*-percent rate has not been calculated as the details of the Sprint-Time Warner agreement have not been provided. Consolidated argued that the purpose of its proposed alternate rate is to reflect that the last-mile provider is paying Sprint to terminate the traffic to Consolidated' network and that the compensation should be allocated in part to Consolidated for performing the termination services for Sprint and the last-mile provider. Consolidated states that in the event Sprint does not disclose its compensation arrangements with the last-mile provider the compensation rates will be $0.004931.[131]

Consolidated described its proposed Section 10 of the agreement as a stand-alone attachment that contains seven sections addressing VoIP-related matters. According to Consolidated, addressing VoIP and VoIP related issues in one attachment is important for the following reasons: Sub-Section 1 sets out the scope and purpose of Attachment 10 and specifically acknowledges that Sprint is acting as a wholesale provider for last-mile providers. Sub-Section 2 provides that VoIP traffic and other traffic may be exchanged over the same facility. Sub-Section 3 covers the compensation rate and the promise that the traffic will not be nomadic. Sub-Section 4 specifies the traffic identifiers to be included as well as the call detail record information required to accurately classify the traffic. Sub-Section 5 provides for the correction and treatment of traffic not proper classified and also contains a dispute resolution provision. Sub-Section 6 addresses situations in which there is either unidentified or unclassified IP-PSTN Termination Traffic and it also contains a "safe harbor rule" that limits the application of Section 6.2 so long as 90% of the traffic contains the traffic identifiers. Sub- Section 7 contains the change of law provisions.

Consolidated also argued that part of its proposed Section 1.5 of the General Terms and Conditions is important to Issue 4 because Section 1.5 is intended to state as a general matter the state of regulatory affairs regarding VoIP and to state that compensation for VoIP is addressed in Attachment 10 of the agreement.[132]

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[130] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[131] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 18-19.

[132] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 19-24.

Consolidated argued that the same compensation terms will apply regardless of which entity originates or terminates a call and that traffic that utilizes VoIP should be treated differently if it is exchanged using TDM format.[133] Consolidated argued that the compensation exchanged between the Parties for terminating traffic should not be the same for the following reasons: (i) Sprint is proposing a wholesale/retail arrangement versus an arrangement between facilities-based, retail carriers; (ii) compensation for IP-to-PSTN termination traffic is currently under FCC consideration, has not been defined, and is not currently compensable on a reciprocal compensation basis; (iii) FCC rules do not contemplate a reciprocal compensation/bill and keep arrangement in the context of Sprint's business model; (iv) the undisputed terms of the Agreement do not authorize reciprocal compensation/bill and keep arrangements in the context of Sprint's business model; and (v) Sprint has not offered any proposed language for compensation as an alternative to Consolidated's alternative compensation models described in Attachment 2, Section 8 and Attachment 10 of the Agreement.[134]

Consolidated asserted it has offered two alternatives for compensation for last-mile provider traffic in which Sprint compensates Consolidated for last-mile provider (local and EAS) traffic terminated to Consolidated at limited rates commensurate to the rates that would be charged for transit traffic under the Agreement. According to Consolidated, it arrives at the same result whether the compensation structure is based on the VoIP or wholesale nature of the traffic.[135]

Consolidated pointed to the direct testimony of Sprint witness Burt in which Mr. Burt cites 47 C.F.R. §51.701(e) as the applicable FCC rule defining a reciprocal compensation arrangement. Section 51.701(e) provides:

> (e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunication traffic ***that***

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[133] Consolidated Post-hearing Brief at 8.

[134] Consolidated Post-hearing Brief at 8.

[135] Consolidated Post-hearing Brief at 9.

originates on the network facilities of the other carrier [emphasis supplied by Consolidated].[136]

Consolidated argued that Sprint's arrangement with its last mile provider does not support a reciprocal compensation arrangement under Section 51.701(e) of the FCC rules. According to Consolidated, Sprint cannot transport and terminate traffic on Sprint's network facilities, nor does Sprint's traffic originate on its network facilities. Instead, Consolidated argued, an agreement between Consolidated and the last-mile provider might support a reciprocal compensation arrangement, but Sprint's proposed arrangement does not.[137]

Arbitrators' Decision

The Arbitrators find that compensation for traffic exchanged between the parties should treated in same manner as any other voice traffic. Specifically, the Arbitrators find that the compensation the parties shall pay each other for Local and EAS traffic shall be bill and keep and shall be consistent with the compensation arrangement set forth in the current Consolidated/ETS Interconnection Agreement in Attachment No. 2, Section 3.2.[138] The Arbitrators' finding is also consistent with the treatment of traffic exchanged addressed in the Illinois Sprint/Consolidated Interconnection Agreement.[139]

The Arbitrators agree with Sprint that there is no basis for an alternative compensation treatment of traffic that originates from or terminates to an end user customer that is provisioned as a VoIP service offering. As noted by Sprint, at the point at which traffic is exchanged between Sprint and Consolidated, the traffic will be in TDM format and will be indistinguishable from traditional TDM traffic, a view that has previously been shared with the Commission in Docket No. 32582.[140]

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[136] Consolidated Post-hearing Brief at 11.

[137] Consolidated Post-hearing Brief at 11.

[138] Direct Testimony of James C. Burt, Sprint Ex. 1, JRB-2, Attachment 2 - Compensation, Page 2, Section 3.2 (Bates 132).

[139] Direct Testimony of James C. Burt, Sprint Ex. 1, Ex. JRB 1, Attachment No 2 - Compensation, Page 2, Section 3.2 (Bates 81).

[140] Docket No. 32582, Direct Testimony of Randy Klaus, Public Utility Commission of Texas Staff at 18 (June 13, 2006).

The Arbitrators find the bill and keep compensation option for local and EAS traffic exchange between the Parties to be the only viable compensation option presented. The per-minute-of-use (MOU) rate of $0.004931 proposed by Consolidated is based on the MOU rate Consolidated charges for "transit traffic." As explained in Issue Number 5 below, the Arbitrators do not agree with Consolidated's position that Sprint is performing a transit function on behalf of last-mile providers. Accordingly, the Arbitrators find no basis to justify the per MOU compensation rate proposed by Consolidated for terminating local and EAS traffic. The Arbitrators note that Consolidated did not enter any cost documentation into the record that supports the proposed per MOU rate.

The Arbitrators do not agree with Consolidated's proposal that asymmetrical compensation rates should apply to the local and EAS traffic exchanged between the Parties. The Arbitrators are unaware of any compensation arrangements for the exchange of local traffic between local exchange companies where only one of the parties receives compensation. The Arbitrators do not agree with Consolidated that the FCC's current consideration of VoIP-related issues somehow justifies Consolidated's proposed asymmetrical local compensation rates based on Consolidated's theory that the FCC has yet to determine the regulatory status of VoIP services.

The fact that the FCC has not specifically addressed Sprint's proposed business model does not mean that the Commission is precluded from approving an interconnection agreement based on Sprint's VoIP over last-mile provider business model. The Arbitrators find the business model proposed by Sprint to be a method by which facilities-based competition can be introduced into areas where such competition would not otherwise exist.

The Arbitrators agree with Consolidated's expressed concerns regarding arbitrage, and are also aware of the problems that a bill and keep arrangement can create in the context of the proposed business model. However, as discussed in Issue No. 5 below, in recognition of the potential of arbitrage issues associated with bill and keep compensation arrangements, the Arbitrators have adopted audit provisions that will permit the Parties to address the arbitrage issues.

The Arbitrators also note Consolidated proposed an Attachment 10 to the Interconnection Agreement to specifically address Voice over Internet Protocol Traffic. The Arbitrators find

Section 10 is necessary to recognize and manage the VoIP related issues that are central to this Interconnection Agreement. Certain modifications to Attachment 10 are required to ensure it does not conflict with the bill and keep compensation arrangement described and to harmonize Section 10 with other findings in this Arbitration Award. The Arbitrators note that Sprint claims that the inclusion of Attachment 10 as proposed would create conflict with terms contained elsewhere in the approved and agreed-upon language. The Arbitrators disagree with Sprint's claim and note that the single example that Sprint cites of conflicting terms references "agreed upon records to be exchanged with traffic...." The reference is presumably to language in Section 2.2 of the Interconnection Agreement that addresses call identifiers. The Arbitrators do not find that the provisions of Attachment 10 are in conflict with Section 2.2 of the Interconnection Agreement or any other provision of the Interconnection Agreement. Furthermore, the Arbitrators find that the inclusion of Attachment 10 produces an interconnection agreement that accurately reflects the business arrangement at issue in this arbitration. However, in order to address Sprint's concern and in an abundance of caution, the Arbitrators have included language in Attachment 10 that makes clear that the text of Attachment 10 is intended to supplement, and not conflict with, the text of the Interconnection Agreement. The Arbitrators have also edited Attachment 10 in order to ensure no apparent conflicts are created by its inclusion. Therefore, the Arbitrators adopt Attachment 10, for IP-Enabled Services (VoIP) with the modifications indicated below. Text deleted is stricken; text added is bolded and underlined.

ATTACHMENT 10
IP-PSTN TERMINATION TRAFFIC

1.0 Attachment to Apply to IP-PSTN Termination Traffic

1.1 This attachment applies solely to IP-PSTN Termination Traffic exchanged between CLEC and ILEC on behalf of ~~authorized~~ Last Mile Providers under this Agreement. The Parties acknowledge that CLEC is providing certain wholesale functions for ~~TWC~~ **Last Mile Providers** including the conversion, interconnection and exchange of IP-PSTN termination traffic pursuant to this Agreement pursuant to ~~the~~ **a** Sprint-~~TWC~~ - **Last Mile Provider** Arrangement. Such ~~traffic and any other~~ IP-PSTN Termination Traffic ~~of other authorized of other authorized Last Mile Providers under this Agreement~~ shall be subject to the terms of this Attachment and to the extent applicable, the other Attachments to this Agreement. **The terms of this Attachment 10 are supplemental; to the extent any term or provision of this Attachment 10 conflicts with any term or provision in the instant Interconnection Agreement, the term or provision in the instant Interconnection Agreement shall control.**

1.2 This Attachment provides a compensation arrangement between the Parties for the exchange of IP-PSTN Termination traffic pending further clarification of regulator issues under Applicable Law (as hereafter defined). Upon the issuance of a final, non-appealable order or other determination pursuant to those proceedings described as *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, established in Notice of Proposed Rulemaking Order No. 01-132 (April 27, 2001), *In the Matter of IP Enabled Services*, WC Docket 04-36, FCC Docket No. WC 06-55, *In re Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection pursuant to Section 251 of the Communications Act of 1934, as Amended to Provide Wholesale Telecommunications Services to VoIP Providers*, or any other FCC proceeding or other legislative administrative or judicial decision that determines the classification of interconnection rights and/or compensation obligations of the Parties with respect to the IP-PSTN Termination Traffic, the Parties shall upon written request of a Party, promptly renegotiate in good faith and amend in writing this Attachment in order to make such mutually acceptable revisions to this Attachment as may be required in order to conform the Attachment to such changes in Applicable Law. During the pendency of such negotiations, the Parties shall continue to perform in accordance with the terms and conditions of this Attachment until amended or superseded by a successor agreement or is otherwise terminated in accordance with Section 4.0 of the General Terms and Conditions of this Agreement. The Parties will endeavor to complete the negotiations as soon as possible and in all events within one hundred twenty (120) days of determination by the FCC or other Applicable Law.

1.3 The obligations of the Parties with respect to IP-PSTN Termination Traffic under this Attachment shall be in addition to the obligations generally applicable to traffic exchanged under this Agreement and as set forth elsewhere in the Agreement and its other attachments. Except as otherwise expressly stated in this Attachment 10, the terms of the Agreement and all attachments shall apply to IP-PSTN Termination Traffic.

2.0 Interconnection Facilities

2.1 IP-PSTN Termination Traffic will be exchanged over the same facilities as Telecommunications Services delivered by either Party under the terms of the Agreement.

3.0 Compensation for IP-PSTN Termination Traffic

3.1 Notwithstanding anything in this Agreement to the contrary, **bill and keep shall be the compensation method by which** the Party responsible for IP-PSTN Termination Traffic that would be considered Local Traffic or EAS traffic if originated as Telecommunications Services on the Party's network will be compensate the other Party for such IP-PSTN Termination Traffic ~~at the rate of $.004931 per MOU~~. With respect to all other IP-PSTN Termination Traffic, the responsible Party will compensation the other Party at the appropriate tariffed switch access rate for such traffic.

3.2 The Party responsible for IP-PSTN Termination Traffic for purposes of 3.1 above (the "Responsible Party") is the Party converting traffic from IP to PSTN for termination to the PSTN network or converting PSTN traffic to IP to for termination through the authorized Last Mile Providers as VoIP traffic. CLEC is the Responsible Party with respect to traffic originated by or terminated to CLEC for the Sprint-~~TWC~~ **Last Mile Provider** Arrangement.

3.3 None of the IP-PSTN Termination Traffic will be Nomadic Traffic unless otherwise certified in writing in advance by the Responsible Party and the Parties have agreed on a mutually-agreeable rate of compensation for Nomadic Traffic.

3.4 At such time as another rate of compensation is determined by the FCC or other Applicable Law for the IP-PSTN Termination Traffic, the parties agree to renegotiate the compensation rate ~~per MOU~~ as then required.

4.0 Additional Information Delivered by Responsible Party

4.1 In addition to the Parties' obligation to deliver IP-PSTN Termination Traffic with accurate Traffic Identifiers as set forth in Section 2.0 of Attachment 2, each month, the Responsible Party for any IP-PSTN Traffic will provide, in electronic format acceptable to the other Party, a call detail record for each IP-PSTN Termination Traffic call delivered by the Responsible Party. Such call detail records shall contain, at a minimum, the following information: Message Date (MM/DD/YY); Originating Number; Terminating Number; Terminating LRN; Connect Time; and Elapsed Time. Additionally the Responsible Party agrees to provide information sufficient to accurately classify the traffic (Local Traffic, EAS, Intrastate Switched Access (includes IntraLATA TOLL), Interstate Switched Access, and such other information as may be reasonable required by the terminating Party to classify the traffic.

5.0 Correction and Treatment of Traffic that is Not Properly Classified

5.1 Nothing herein shall in any manner reduce or otherwise limit or discharge the Responsible Parties' obligations under the Agreement to properly classify IP-PSTN Termination Traffic delivered under the Agreement in accordance with the terms of this Agreement and its Attachments, included but not limited to Section 1.4 of Attachment 2.

5.2 If the terminating Party determines in good faith in any month that any IP-PSTN Termination Traffic originated by the Responsible Party is classified by the Responsible Party (1) as IP-PSTN Traffic when it is not IP-PSTN Traffic (e.g. it is PSTN-IP-PSTN traffic), or (2) as traffic subject the compensation rate for Local Traffic or EAS traffic when in reality the traffic is subject to the terminating Party's state or federal switched access tariff, the Parties agree.

5.2.1 The terminating Party will provide sufficient call detail records or other information (including the reasons that the terminating Party believes the IP-PSTN Termination Traffic is misidentified) to permit the Responsible Party to investigate and identify the traffic the terminating Party has determined is misidentified;

5.2.2 The Responsible Party shall correct the classification for such traffic and pay the appropriate tariffed switched access rates for the applicable traffic going forward, including for traffic terminated but not yet billed, and/or in a true-up amount, for traffic already billed and paid; and,

5.2.3 Where the appropriate classification of such traffic is indeterminable, such traffic will be rated in accordance with Section 6.0 or 7.0 of this Attachment as appropriate.

5.2.4 In the event the Responsible party disagrees with the terminating Party's determination that traffic has been misidentified, the Responsible Party will provide written notice of its dispute within sixty (60) days of notification under 5.1.1 and provide all documentation that is the basis for Responsible Party's challenge of the terminating Party's claim. If the parties are not able to mutually agree as to the proper treatment of the traffic based on the documentation produced, the dispute resolution procedures of this Agreement shall apply.

6.0 Unidentified and Unclassified IP-PSTN Termination Traffic.

6.1 The Parties acknowledge that certain IP-PSTN Termination Traffic, due to the technical nature of its origination, may be properly transmitted without all Traffic identifiers. In such instances, the Parties agree that such IP-PSTN Termination Traffic shall be considered "Unclassified Traffic" if the traffic can be affirmatively demonstrated to be missing Traffic Identifiers by means other than the Traffic Identifiers being stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned. Otherwise, the traffic shall be considered "Misclassified Traffic" as described below.

6.2 Provided that the percentage of IP-PSTN Termination Traffic calls transmitted under this Agreement with accurate Traffic Identifies in a given month is greater than or equal to 90%, any remaining calls (those transmitted without accurate Traffic Identifiers) will be billed at rates calculated consistent with, and in proportion to, the IP-PSTN Termination Traffic exchanged with accurate Traffic Identifiers under this Agreement. If, however, the percentage of total IP-PSTN Termination Traffic calls transmitted with accurate Traffic Identifiers (including for this purpose any Misclassified Traffic) in a given month falls below 90%, the Originating Party agrees to pay the terminating Party's intrastate access rates for all Unclassified Traffic for the applicable month

6.3 Notwithstanding anything herein to the contrary, all Misclassified Traffic will be billed at intrastate access rates.

7.0 Change in Compensation Rate under Applicable Law

7.1 At such time as another rate of compensation is determined by the FCC or other Applicable Law for IP-PSTN Termination Traffic, the parties agree, as soon as possible and in all events within one hundred twenty (120) days of the applicable determination by the FCC or other Applicable Law, to amend the compensation rates set forth in this Agreement to the new rates of compensation to be effective prospectively from the date of mutual signature of the amendment or, if an effective date for such rates is explicitly ordered by the FCC in its final ruling, then as of such date. In the event adjustments need to be made retroactively to comport with Applicable Law, the Parties agree to true up any rates in a retroactive manner to the FCC-ordered effective date.

Sprint Issue 5 - Consolidated Issue 8-A

Sprint - Should Sprint be required to provide audit rights beyond industry standards?

Consolidated - Should each party's traffic be subject to audit?

Sprint's Position

Sprint contended it should not be required to provide extraordinary audit rights beyond industry standards that would include access to last-mile provider information that may be proprietary or competitively sensitive.[141] According to Sprint, Consolidated admits that it will be

[141] Direct Testimony of James R. Burt, Sprint Ex.1 at 35-35.

receiving traffic from Sprint in the TDM format and according to Sprint, Consolidated's request is akin to Sprint asking to see Consolidated's traffic reports and data as well as the traffic reports and data of each of the ILECs, CLECs, IXCs and CMRS carriers behind Consolidated's tandem.[142] Sprint alleged that Consolidated does not need to see the traffic reports and data from the last-mile provider to ensure accurate traffic reporting from Sprint.[143] Moreover, Sprint claimed that the Parties have agreed to share SS7 signaling in accordance with Attachment 3, which is the standard protocol used throughout the industry for the exchange of traffic information, and Sprint claimed it has not encountered any problems with its interconnection counterpart through the use of SS7 signaling.[144]

Sprint claimed that if it were the retail provider in this interconnection agreement the information provided by Sprint would be exactly the same as it is here where Sprint is the wholesale provider.[145] Sprint explained that Consolidated is implying that because of the wholesale model the traffic is not Sprint's, an implication that Sprint disputed. According to Sprint, the call information signal (SS7) is created at Sprint's switch and is not information generated by another entity that Sprint simply passes along.[146] Moreover, Sprint stated that other sections of the contract already address Consolidated's auditing concerns about VoIP-based traffic using only Sprint's data. Sprint specifically pointed to Section 1.5, 10.2 and 10.3 that from its perspective address audit concerns. Sprint claimed that Section 1.5 states that "CLEC will be financially responsible for all traffic sent to ILEC under the agreement." Thus Sprint claims it will be responsible for 100% of the traffic.[147]

Sprint claimed that Consolidated's proposed language would allow Consolidated to see not only the local traffic that the last-mile provider sends to Sprint, but Sprint's interexchange toll traffic as well. Sprint claimed Consolidated should only be concerned about traffic that Sprint delivers to Consolidated and traffic that Sprint delivers from the last-mile provider that

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[142] Direct Testimony of James R. Burt, Sprint Ex.1 at 35.

[143] Direct Testimony of James R. Burt, Sprint Ex.1 at 35.

[144] Direct Testimony of James R. Burt, Sprint Ex.1 at 35-36.

[145] Direct Testimony of James R. Burt, Sprint Ex.1 at 36.

[146] Direct Testimony of James R. Burt, Sprint Ex.1 at 36.

[147] Direct Testimony of James R. Burt, Sprint Ex.1 at 36.

by-passes Consolidated's network is of no concern to Consolidated.[148] Also, according to Sprint, Consolidated does not impose the same onerous audit requirements on other providers that carry VoIP traffic such as ETS even though ETS is a VoIP-based telecommunication provider. Sprint notes that the Consolidated/ETS interconnection agreement does not contain additional restrictive language in its "Section 31 -Verification Reviews."[149] Sprint suggested that Consolidated's refusal to offer Sprint the same audit terms Consolidated agreed to with ETS is blatantly discriminatory and contradicts sworn assurances in the Joint Motion for Approval of the Consolidated/ETS agreement filed with the Commission that the Consolidated/ETS Agreement does not discriminate against other carriers.[150]

Consolidated's Position

Consolidated noted that schemes that purposely disguise the originating location of the call in order to benefit from lower compensation charges have been uncovered over the last several years.[151] Consolidated points to NTS as an example of a long distance provider that improperly reported its intrastate minutes of use in order to avoid paying intrastate access rates, claiming all of its traffic was interstate in order to pay the lower access charges.[152] According to Consolidated, history has led it to conclude that it can no longer count on an industry "code of honor" to ensure all traffic identifiers will be accurate in order to receive the proper compensation for use of its network and that traffic audits are but one means of discouraging behavior that would seek to deploy arbitrage schemes that disguise the originating location.[153]

Consolidated argued that it is not sure what Sprint is referring to as an "industry standard" for audit rights and claims that it appears to be yet another example of Sprint

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[148] Direct Testimony of James R. Burt, Sprint Ex.1 at 37.

[149] Direct Testimony of James R. Burt, Sprint Ex.1 at 37.

[150] Docket No. 32917, *Joint Application of Consolidated Communications Company of Fort Bend Company and ETS Telephone Company, Inc. for Approval of an Interconnection Agreement under the Federal Telecommunications Act of 1996 and the Public Utility Regulatory Act*, Attachment 3, *Affidavit of Representative of Consolidated Communications of Fort Bend Company* (July 10, 2006).

[151] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 3.

[152] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 3.

[153] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 3.

attempting to make its business model look like a PSTN-to-PSTN arrangement.[154] Moreover, Consolidated asserted that Sprint's claim that it is taking responsibility for the traffic is insufficient.[155]

Consolidated claimed that audit rights should not be restricted only for the purpose of evaluating the accuracy of the other party's billing and invoicing. Consolidated noted that while such an audit is important it is only useful to ensure that the Party receiving a bill really owes the amount billed. However, according to Consolidated, this type of evaluation does not ensure that the *invoicing* company has received accurate information in order to *charge* the terminating carrier the appropriate rates.[156] Consolidated claimed that audit rights that do not extend to traffic information (*i.e.,* information regarding the true geographic location of the origin of the call) would not give the *invoicing Party* (in this case Consolidated) the protection it needs to assure it the information sent to it (*i.e.,* sent to it from Sprint) was accurate so that it could collect the proper amounts.[157]

Consolidated drew a distinction between a strictly wireline TDM environment and a VoIP-to-PSTN environment. According to Consolidated, in a wireline TDM environment the wholesale provider would receive signaling from the originating carrier that would be passed through to the terminating carrier and the wholesaler would not have control over what was signaled; it would merely pass what it received.[158] Consolidated pointed to what it claims are signaling rules and strong penalties at the federal level for all parties sending traffic to the PSTN. According to Consolidated, absent those strong rules and penalties, contracting parties would need strong contract provisions to ensure the wholesale provider could and would be responsible for what its customers send to it, whether or not the wholesale provider is taking responsibility for payment once it has been determined the calls have accurate identifiers for rating.[159]

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[154] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 4.

[155] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 4.

[156] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 4.

[157] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 5.

[158] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 5.

[159] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 5.

Moreover, Consolidated claimed that the nomadic nature of VoIP traffic has to be dealt with appropriately. Consolidated claimed that in the VoIP environment the telephone number associated with a device can be provisioned to work at locations other than a fixed location and even if the telephone number sent as the CPN accurately represents the terminal device the party is using, it does not necessarily represent the origination location of the call as represented by the rate center associated with the calling number. Consolidated claimed that audit rights would need to extend to information only the Party actually provisioning the service would have in order to determine if the service was provisioned as a fixed or nomadic service.[160]

Consolidated expressed concern regarding the ability of other carriers to MFN into this agreement. Consolidated noted that such carriers are unknown to Consolidated at this time, but without the audit protections in place requested by Consolidated the company may fall prey to the practices of less scrupulous carriers who seek to take advantage of an interconnection agreement with weak or non-existent audit provisions. [161]

Arbitrators' Decision

The Arbitrators agree with Consolidated regarding the necessity of adequate audit provisions. The Arbitrators note that concern about arbitrage problems was discussed in the direct testimony of Commission Staff witness Randy Klaus in Docket No. 32582, wherein Mr. Klaus stated, "the issue of the 'phantom traffic' problem can be alleviated or mitigated by carefully crafting an interconnection agreement that specifically addresses such concerns."[162] The Arbitrators have no doubt that Sprint intends to oversee and enforce the provisions in its contracts with its last-mile providers. However, the Arbitrators also understand that other carriers will have the option to MFN into this agreement and such carriers may seek to take advantage of weak audit rights to the detriment of Consolidated. The Arbitrators find in the context of this arbitration and the business model that underlies it that clear and enforceable contract language supporting strict audit rights that will tend to prohibit, or at least strongly discourage, arbitrage is necessary in this agreement.

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[160] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 6.

[161] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 6.

[162] Docket No. 32582, Direct Testimony of Commission Staff Witness Klaus at 18 (June 13, 2006).

The Arbitrators agree with Consolidated that the signaling rules and calling party number transmission requirements applicable to traditional voice TDM message do not apply to the traffic to be exchanged by the Parties. The Arbitrators note that Sprint represented that its switches will originate the calls that will be passed to Consolidated; however, the calls originated by Sprint's switches will be a function of signals passed to that switch from its last-mile providers. Without access to and knowledge of the information passed by the last-mile providers Consolidated's audits will be limited to verification of the accuracy of the bills generated by Sprint's switch. Such an audit would be limited of value and could not be used to determine with any accuracy the originating location of the call. Therefore, the Arbitrators grant in total the audit provisions as outlined in the contract language proposed by Consolidated in DPL No. 5 as set out below for convenience:

> 31.1 Subject to each Party's reasonable security requirements and except as may be otherwise specifically provided in this Agreement, either Party may audit the other Party's relevant books, records and other documents pertaining to services provided under this Agreement once in each Contract Year and/or following termination of the Agreement to evaluate the accuracy of the other Party's billing, data and invoicing, including usage data, source data, and other information and documents in accordance with this Agreement. The relevant books, records and other documents include, but are not limited to, usage data, source data, traffic reports and associated data (including such traffic reports and associated data from ~~TWC and other~~ Last Mile Providers) and other information and documents in accordance with this Agreement. Such audit will take place at a time and place agreed on by the Parties no later than sixty (60) days after notice thereof.
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> 31.2 The review will consist of an examination and verification of data involving usage data, records, systems, procedures and other information related to the traffic delivered or services performed by either Party as related to settlement charges or payments made in connection with this Agreement as determined by either Party to be reasonably required. Each Party shall maintain reasonable records for a minimum of twelve (12) months and provide the other Party with reasonable access to such information as is necessary to determine amounts receivable or payable under this Agreement. Such records shall include usage records for the traffic delivered by the Party to the Other Party.
>
> 31.4 Each Party will cooperate fully in any such audit, providing reasonable access to any and all appropriate employees, subcontractors and other agents and books, records and other documents reasonably necessary to assess the accuracy the Party's billings, data and invoices. With respect to authorized Last Mile Providers, such as traffic associated with the Sprint-~~TWC,~~ **Last Mile Provider** Arrangement, the Responsible Party will obtain and provide access to all books, records, documents and other information reasonably necessary to assess the accuracy of the data applicable to that traffic.

Sprint Issue 6 – Consolidated Issue 9

This issue has been resolved.

Sprint Issue 7 - Consolidated Issue 10

***Sprint** - Should Sprint be required to warrant that it is a telecommunications carrier?*

***Consolidated** - Should each Party warrant that it has the authority to enter into and utilize this agreement for authorized purposes? Specifically, should each Party warrant that it is a Telecommunications Carrier providing Telecommunications Services in accordance with the Federal Telecommunications Act. ?*

Sprint's Position

Sprint claimed it is willing to represent that it is a "Telecommunications Carrier" but that it is unwilling to provide a "warranty" as to its status as a Telecommunications Carrier. Sprint argued that Consolidated is unwilling to accept a representation in lieu of a warranty because Consolidated believes that Consolidated may not have a legal cause of action for breach of a representation where it believes it would for breach of a warranty.[163] Sprint further asserted that it believes Consolidated's insistence on the proffered warranty language is a transparent improper attempt to keep alive an issue already decided in Sprint's favor in Docket No. 32582, wherein the Commission terminated Consolidated's rural exemption. Sprint claimed that from its perspective only a change of law could cause it not to continue to qualify as a Telecommunications Carrier and neither Party should be required to warrant that the law will never change.[164] Sprint's witness Burt stated that he believed that a warranty seemed to be in the nature of a guaranty and he believes a party cannot and should provide a guaranty on an issue that it does not control.[165]

Consolidated's Position

Consolidated claimed that warranties in sections 47.1 and 47.2 are in Consolidated's standard interconnection agreement and have been accepted without protest by other

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[163] Direct Testimony of James R. Burt, Sprint Ex. 1 at 40.

[164] Direct Testimony of James R. Burt, Sprint Ex. 1 at 40.

[165] Direct Testimony of James R. Burt, Sprint Ex. 1 at 40.

interconnecting carriers.[166] Consolidated claimed the proposed language only imposes a duty to warrant what the FTA requires to enter into an interconnection agreement: namely that a CLEC be and continue to be a Telecommunications Carrier providing Telecommunications Services and have appropriate certifications required for its activities.[167]

Consolidated claimed warranties are usual and customary for such agreements and consistent with other terms contained in the agreement. Consolidated claimed Sprint has resisted discovery requesting examples of warranties it has made in other agreements, but Consolidated stated it believes Sprint has made the same or substantially similar warranties in contexts applicable to the services to be utilized by Sprint.[168] Consolidated found it curious that Sprint has agreed to warrants in other sections of the interconnection agreement but insists on removing the warrants from Section 47.1 and 47.2 of the proposed agreement.[169]

Consolidated claimed that Sprint must be a Telecommunications Carrier providing Telecommunications Services in order to interconnect with Consolidated under the FTA and that being a Telecommunications Carrier is a continuing requirement.[170] Consolidated argued that Sprint's proposed contract language throughout the contract relieves Sprint from that obligation.[171] Consolidated claimed that Sprint has made warranties similar to those sought by Consolidated in other interconnection agreements and points to Docket No. 26978 which dealt with interconnection between SBC (as an ILEC) and Sprint (as the CLEC), wherein, Consolidated alleges that Sprint warranted that it is authorized to provide "Telecommunications Services."[172] Consolidated claimed that a requesting carrier must be a "Telecommunications Carrier" to make an interconnection request and notes that no other carriers seeking interconnection with Consolidated have had difficulties making such warranties.[173]

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[166] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[167] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[168] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[169] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[170] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 26.

[171] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 26.

[172] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 26.

[173] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 27.

Arbitrators' Decision

The Parties' dispute here turns on the distinction between the words "warrant" and "represents." Consolidated wants Sprint to "warrant" that it "...is, and at all times will remain, a Telecommunications Carrier providing Telecommunications Services in accordance with the Act" and "...that it will have obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement."[174] Sprint wants to instead "represent" that it "...is a Telecommunications Carrier providing Telecommunication Services in accordance with the Act" and "...that it will have obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement."[175]

Black's Law Dictionary defines "warranty" under the subheading "contracts" as "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties...."[176] Interestingly, the Black's definition of "warranty" provides a note of explanation of the difference between the terms "warranty" and "representation":

> A warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usually only a collateral inducement, (2) a warranty is always written on the face of the contract, while a representation may be written or oral, (3) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation is material, and (4) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation.[177]

So, then, Consolidated is seeking Sprint's strict compliance with a material term of the agreement, namely that Sprint guarantee, on pain of potential liability for material breach of the agreement, that Sprint *is and shall at all times remain* a Telecommunications Carrier providing Telecommunications Services and that *it will have* obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement.

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[174] Jointly-filed DPL at 28-29 (Oct. 26, 2006).

[175] Jointly-filed DPL at 28-29 (Oct. 26, 2006).

[176] Black's Law Dictionary 1581 (7th ed. 1999).

[177] Black's Law Dictionary 1581 (7th ed. 1999).

The Arbitrators find that Consolidated is asking Sprint to guarantee, for the life of the agreement, something that is in both instances beyond Sprint's exclusive control. Obviously, and as noted by Sprint's witness Burt, regulatory authorities have the power to define the terms at issue and the parties do not.[178] A federal court or the Federal Communication's Commission could issue a ruling at some point in the future that could bring Sprint's status as a "Telecommunications Carrier providing Telecommunications Services" into question or doubt. Neither party can reasonably be expected to predict whether and to what extent federal laws and regulations may change in regard to the definition of the terms in question. Accordingly, the Arbitrators decline to subject either Party to a potential claim of breach of warranty for matters that are beyond that Party's exclusive control. Likewise, neither Party can reasonably be expected to guarantee that it will have all necessary jurisdictional certifications by a date certain. Whether or not a Party has such certifications by a date certain often lies beyond the exclusive control of that Party. The Arbitrators note that adopting the language proposed by Sprint here will not prejudice either Party's right to seek an appropriate remedy in an appropriate forum if federal laws or regulations change with respect to the definition of "Telecommunications Carrier," "Telecommunication Services," or some other related matter, or if one Party fails to obtain its necessary jurisdictional certifications in a timely manner.

For the reasons discussed above, the Arbitrator's find Consolidated's position unreasonable, Sprint's position reasonable, and adopt the language proposed by Sprint for Section 47.1 and Section 47.2 of the agreement as set out below for convenience:[179]

> 47.1 Each Party represents that, for the purposes of this Agreement and the utilization of services provided pursuant to this Agreement, the Party is a Telecommunications Carrier providing Telecommunications Services in accordance with the Act.
>
> 47.2 Each Party represents that it will have obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement. Upon request each Party shall provide proof of certification to the other Party.

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[178] Tr. at 243 (Nov. 2, 2006).

[179] Jointly-filed DPL at 28-29.

Sprint Issue 8 - Consolidated Issue 13

***Sprint** - Does service provided under wholesale arrangements to a last-mile provider constitute transit traffic?*

***Consolidated** -Should last-mile provider traffic exchanges between parties under the agreement be excluded from the definition of Transit Traffic generally or be excluded for compensation purposes only?*

Sprint's Position

Sprint asserted that transit traffic is traffic that is exchanged between the Parties that originates or terminates on the network of a third party. Sprint claimed the Parties disagree on the definition of transit traffic and it is Sprint's position that Sprint is not acting as a transit provider for the traffic originating from and terminating to the subscribers of the Sprint last-mile provider's service. Sprint noted that it does not believe that Consolidated seriously contends that Sprint is a transit provider, but the problem lies in the breadth of the definition of transit traffic that Consolidated proposed to include in the agreement. Sprint stated that in order to avoid any potential for future controversy, it proposes that the agreement reflect the Parties' understanding that Sprint is not functioning as a transit provider[180]

Consolidated's Position

Consolidated noted the Parties agree that the provisions of the agreement applicable to transit traffic should not apply to the last-mile provider for purposes of compensation. However, according to Consolidated, the Parties disagree as to the rationale for such exclusion. According to Consolidated, Sprint's proposed definition of transit traffic without the disputed language is the same as Consolidated's. However, Consolidated claimed that Sprint's proposed language takes Consolidated's proposed definition and grafts onto it an artificial assertion that Sprint is originating the last-mile provider traffic. Consolidated claimed that Sprint's approach makes no

[180] Direct Testimony of James R. Burt, Sprint Ex. 1 at 41-42.

sense because if effectively butchers the definition of transit traffic in order to make that definition fit Sprint's wholesale VoIP business model.[181] Consolidated explained that its proposed language specifically excludes wholesale VoIP traffic as transit traffic for compensation purposes and further explained that while Consolidated believes such traffic originates on a third party's VoIP network, Consolidated does not believe such traffic should be compensated as transit traffic under this agreement.[182] Consolidated claimed its definition should be used in the agreement because it accurately recognizes and defines such traffic and does not unduly restrict what is and is not transit traffic.[183]

Arbitrators' Decision

The Arbitrators find that Sprint it is not acting as a transit provider in the context of this agreement. Moreover, the Arbitrators note that Sprint has stated that it will not act as a transit provider in its business relationship with Consolidated. The Arbitrators find Sprint's role in the serving arrangement described in Sprint's business model as simply providing a part of the line-side circuits between the local switch and the end user premises, *i.e.*, the local loop and switching required to provide local exchange service. Furthermore, the Arbitrators distinguish Sprint's function here from that of "a transit traffic provider." The transmission provided by Sprint is a line-side transmission link that enables the End User to access Sprint's local switch in order to make and receive calls. Transit traffic is trunking traffic passed between two network switches by a third-party.

The Arbitrators find that the traditional "transit traffic" definition does not apply to business models that use a last-mile provider to complete calls to end users. The Arbitrators adopt the definition of Transit Traffic proposed by Sprint with the modification indicated below:

> Attachment 5. Definition. "Transit Traffic" means the delivery of Local Traffic or ISP Bound Traffic by CLEC or ILEC originated and/or terminated by the End User of one Party and originated and/or terminated to a third party ILEC or CLEC over the interconnection trunks. When CLEC has a business arrangement with last-mile providers for interconnection services, ~~CLEC is the originator and~~

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[181] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 28.

[182] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 28.

[183] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 28.

~~terminator of the traffic~~, CLEC is not a Transiting Party and such traffic is not Transit Traffic Under this Agreement.

The deleted text reflects the Arbitrators' finding that although Sprint is not providing "transit traffic" under this specific business model, the CLEC will not in all instances be the originator and terminator of the traffic.

Sprint Issue 9 - Consolidated Issue 4

Sprint - What should be the length of the initial term of the Agreement?

Consolidated -Should the interconnection agreement have a one-year term or a two-year term?

Sprint's Position

Sprint proposed a two-year initial term under the agreement before having to initiate negotiations for a replacement agreement or an extension. According to Sprint, the one-year term proposed by Consolidated is too short; Sprint notes that the negotiating process requires substantial time and resources and argues that the Parties and the Commission would benefit from a longer-term agreement.[184] Further, Sprint claimed that the Change of Law provisions of the agreement would allow for modification of the agreement in the event of a relevant regulatory change.[185]

Consolidated's Position

Consolidated argued that the agreement's initial term should be one year with automatic renewals every six months, unless either Party requests renegotiation. Consolidated noted that should the FCC issue its decisions in its VoIP dockets during the initial term of the agreement, the Parties will have guidance on how to treat VoIP in the subsequent agreement. Consolidated asserted a one year term is prudent given the uncharted territory of crafting an agreement for a wholesale VoIP provider. Consolidated pointed out that the FCC currently has two VoIP proceedings before it that could impact many substantive provisions of this agreement.[186]

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[184] Direct Testimony of James R. Burt, Sprint Ex. 1 at 42-43.

[185] Direct Testimony of James R. Burt, Sprint Ex. 1 at 43.

Arbitrators' Decision

The Arbitrators adopt Sprint's proposal that the term of the agreement is two years. As noted by Sprint, the time required to negotiate this agreement is approaching two years. The Arbitrators also note that the term of the Interconnection Agreement in Docket No. 28821 which was the successor of the T2A Interconnection Agreement is five (5) years. The first sentence of Section 4.1 shall read:

> The Parties agree to the provisions of this Agreement for an initial term of two (2) years from the Effective Date of this Agreement, unless terminated or modified during such initial term pursuant to the terms and conditions of this Agreement.

Sprint Issue 10 - Consolidated Issue 24-A and 25

Sprint - Should an LSR charge apply when porting a telephone number currently in ILEC's billing system, but otherwise at no charge?

Consolidated -Should either party be allowed to charge a service order charge for a Local Service Request and should Directories Price List include the correct reference to the phone directory to be provided?

Sprint's Position

Sprint claimed that the combined service order charge for number portability and directory service request should not apply when Sprint only requests porting a number but does not request directory service. Sprint found no reason to allow Consolidated to recover the cost of local number portability (LNP) and also the cost of local service requests (LSR). Sprint argued its position is consistent with the intent of the FCC that carriers bear their own costs directly related to LNP. Moreover, Sprint claimed it is willing to port a telephone number to Consolidated without assessing a separate LNP service order charge.[187] Sprint argued that Consolidated is already recovering the cost of LNP via the Local Number Portability (LNP) charge it bills to all of its customers each month and cites Consolidated's own customer literature as evidence. According to Sprint, Consolidated provides information to its customers that explains the LNP charge and that information makes clear that the customer is being charged for

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[186] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 29.

[187] Direct Testimony of James R. Burt, Sprint Ex. 1 at 44.